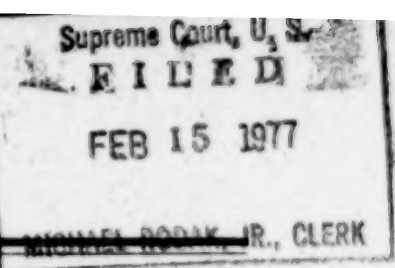


No. 76-767



In the Supreme Court of the United States

OCTOBER TERM, 1976

JACK FRIED, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

DANIEL M. FRIEDMAN,
*Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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In this mail fraud prosecution, petitioner contends that the government failed to prove that he knew that claims contained in advertising literature that he mailed were false.

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of 18 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to three years' imprisonment on one count and concurrent five-year probation terms on the remaining counts. The court of appeals affirmed by judgment order (Pet. App. 1a-3a).

The evidence showed that petitioner organized and operated "Phase Method," a business that purported to prescribe diets on the basis of handwriting analysis.

Petitioner conceived of the business in late 1972 in conjunction with Andrew Linick, a martial arts instructor. Linick testified for the government and indicated that he had devised some diets and secured the services of a handwriting expert and computer company (I, 68a-71a).¹ Petitioner handled the advertising and arranged for its printing and circulation (I, 76a).

The advertisements stated that the company's "scientific technique of Graphotherapy" had been used in Europe for 30 years to achieve weight reduction and claimed further that "Medical Doctors and Psychographologists," aided by "the new MICROSCANOR computer," would analyze the subscriber's handwriting in order "to * * * determine the type of formula best suited * * * for losing weight." The advertisements also claimed that the participant could eat as often as desired and still enjoy weight reduction. Laudatory testimonials were included in the advertisements (II, 351a).

In fact, the described weight loss method had never been developed in Europe or anywhere else until created by petitioner and Linick (I, 154a). The diets sent to subscribers by petitioner's company had no relationship to their handwriting; they varied only with the desired weight loss specified by the individual customer (I, 71a, 73a; II, 261a). Although the customer was asked to indicate the speed with which he desired to lose weight, even this element did not, in fact, affect the diet chosen. The computer merely reprinted a diet according to the desired total weight loss indicated on the customer order form (II, 261a-262a, 343a). The weight losses promised were described by a nutritionist testifying for the government

¹Citations herein are to petitioner's two-volume court of appeals appendix, which he has filed with this Court.

as "highly exaggerated" (I, 152a), "ridiculous" (I, 157a), and "fantastic" (I, 159a).² The computer did not analyze a customer's handwriting; it merely printed out one of the eight programmed sets of three paragraph diets (I, 200a, 195a-197a). The testimonials included within the advertisements were also false; the weight loss program supposedly endorsed by the sponsors had theretofore been nonexistent. Over time, these testimonials were repeated word for word, but attributed to new names at new addresses (II, 345a, 347a).

Petitioner characterizes the issue in this case as involving the definition of the requirements for a finding of reckless criminal fraud in "cases * * * where knowledge or intent is inferred rather than affirmatively established" (Pet. 5). Petitioner fails, however, to identify any instruction to the jury that was allegedly improper, and, in fact, the jury was required to find both knowledge of falsity and intent to defraud in order to convict (II, 331a-332a). Moreover, petitioner does not specifically challenge the related jury instruction "to take into consideration all the facts and circumstances shown by the evidence and to determine from those facts and circumstances whether the requisite knowledge and intent were present at the time in question" (II, 332a), and this instruction was a correct statement of the law. See *American Communications Association v. Douds*, 339 U.S. 382, 411; *United States v. Kozak*, 438 F. 2d 1062, 1067 (C.A. 3), certiorari denied *sub nom. Shopa v. United States*, 402 U.S. 996. In fact, petitioner's real grievance is not against the legal standard; rather, his fundamentally factual claim is that "[t]he evidence in this record does not demonstrate any acts on the part of the petitioner consistent with such a finding of gross carelessness, knowledge and fraud" (Pet. 10).

²Some guaranteed weight losses that, in fact, could not be accomplished even through starvation (I, 150a).

There is no merit to petitioner's contention that the evidence was insufficient. It is apparent from the record that petitioner knew the claims were false. The evidence showed that petitioner was in charge of developing and circulating the advertising matter for Phase Method (I, 76a, 89a, 187a, 192a)³ and that Linick and petitioner determined that there would be no relationship between a customer's handwriting and the weight reduction plan sent out (I, 71a, 73a). When Linick specifically cautioned petitioner that he was concerned "because I read certain things [in the advertising copy] that I thought were exaggerated" (I, 118a; see also I, 78a),⁴ petitioner responded that it was just "advertising puffery * * * a known thing in the industry" (I, 78a). It was also shown that petitioner had instructed one of the computer companies used by Phase Method to select the diets in a fashion that bore no relation to a customer's handwriting (I, 220a-221a). Finally, since petitioner was the innovator of the Phase Method weight reduction program, he obviously knew that it had not been used in Europe and that the testimonials were false.

³Citing Linick's authorship of Defense Exhibit 2, a rough draft of some advertising copy, petitioner suggests (Pet. 9) that Linick was responsible for drafting the false advertisement ultimately mailed out by Phase Method. In fact, Defense Exhibit 2 merely constituted Linick's attempt to rewrite some copy given him by petitioner from one of his unsuccessful past diet promotions, and "it was not used because that's not my forte. So evidently, it wasn't good enough" (I, 143a; see also I, 135a-136a).

⁴While petitioner claims to have relied on Linick's expertise, Linick was a martial arts instructor who claimed to be "self-trained" in nutrition (I, 82a-83a). Further, Linick denied advising petitioner as to many of the factual claims made by the Phase Method advertisements (I, 79a-80a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.